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No. 07-463

In the Supreme Court of the United States

PRISCILLA SUMMERS, ET AL., PETITIONERS

v.

EARTH ISLAND INSTITUTE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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A. The Agency Action Subject To Judicial Review In This Case Was The Burnt Ridge Project, Not 36 C.F.R. 215.4(a) And 215.12(f)

Under this Court's precedents, an agency regulation "is not ordinarily considered the type of agency action 'ripe' for judicial review" unless (1) a special review statute permits the regulation "to be the object of judicial review directly," or (2) the regulation is "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately." *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 891 (1990) (*NWF*); see *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 152-153 (1967) (holding that agency regulations were subject to pre-enforcement judicial review when the regulations forced the plaintiffs either to comply immediately or to risk "serious criminal and civil penalties" for violations); Gov't Br. 14-21. Respondents brought this law-

suit pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and they do not contend that any special review provision authorizes their current challenge to 36 C.F.R. 215.4(a) and 215.12(f). Despite the clarity of the analytical framework set out by this Court in *NWF*, however, respondents argue that *NWF* does not govern the availability of judicial review over challenges to agency regulations. Respondents also contend that Sections 215.4(a) and 215.12(f) subject them to substantial immediate harm. Those arguments lack merit.

1. Respondents contend (Br. 15-17) that *NWF* is inapposite because the plaintiff in that case sought to challenge a broad agency "program" rather than a discrete regulation. In the course of explaining why the challenge was non-justiciable, however, the Court in *NWF* set forth its considered explication of the principles governing judicial review of agency regulations. See 497 U.S. at 891-893. That discussion was an integral part of the Court's reasoning, even though the object of the *NWF* plaintiff's challenge was a "program" rather than a rule. And the Court has since relied on that discussion in subsequent cases in holding that challenges *to regulations* were unripe. See *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 808 (2003) (*NPHA*); *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58 (1993) (*CSS*); Gov't Br. 15-16.

Respondents also point out (Br. 35) that 36 C.F.R. 215.4(a) and 215.12(f) have been applied to numerous Forest Service projects around the country. In the (presumably rare) instances where there is legitimate doubt whether a duly promulgated regulation will *ever* be applied, there is an especially strong reason for denying judicial review. This Court's decisions do not suggest, however, that the general frequency with which a particular regula-

tion has been applied is a sufficient basis for allowing a naked challenge to the regulation on its face, rather than insisting that judicial review focus on subsequent final agency action in which a specific application of the regulation has been shown to injure the plaintiff. Indeed, in a holding that respondents have not contested, the court of appeals in this case held that respondents' challenges to regulations *other than* 36 C.F.R. 215.4(a) and 215.12(f) were unripe for review, even though the court did not question respondents' allegation that those other regulations likewise had "been applied to decisions across the nation." Pet. App. 14a.

2. Although the regulations at issue here are "final agency action" within the meaning of the APA, see Gov't Br. 19, the APA does not authorize judicial review of *every* "final agency action." Rather, review is authorized only if the relevant agency action (1) is "made reviewable by statute" (*i.e.*, by the sort of special review provision that respondents concede is *not* applicable here), or (2) is "final agency action" for which "there is no other adequate remedy in a court." 5 U.S.C. 704. So long as a regulation does not subject a potential plaintiff to immediate *Abbott-Laboratories*-type injury or its equivalent, judicial review of a later final agency action in which there has been a concrete application of the regulation will provide an "adequate remedy" for any legal defect in the rule. See Gov't Br. 20-21. The APA further states that its judicial-review provisions do not affect "the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground," 5 U.S.C. 702, and the APA's equitable remedies (see 5 U.S.C. 703) are unavailable where this Court's ripeness criteria are not satisfied. See *Abbott Labs.*, 387 U.S. at 148; *CSS*, 509 U.S. at 57; Gov't Br. 18-19.

Respondents contend (Br. 15) that "the 'other adequate remedy in court' clause [of 5 U.S.C. 704] applies only where

there is a remedy under a statute *other than the APA*." There is no textual basis for that asserted limitation. To be sure, a primary purpose and effect of the quoted language in Section 704 is to foreclose general district-court APA review of agency action for which Congress has crafted a special review procedure.[1] It does not follow, however, that *only* a special review provision can afford an "adequate remedy." Where, as here, a challenge to the regulation in the context of a decision approving a site-specific project to which the regulation was applied would furnish effective redress for any legal defect in the rule, such a challenge is an "adequate remedy in court." That reading of Section 704 is consistent both with the statutory text and with the policy concerns for avoiding premature (and potentially unnecessary) adjudication that animate this Court's ripeness jurisprudence.[2]

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[1] Contrary to respondents' assertion (Br. 17), the government does not contend that the existence of special review provisions governing particular categories of agency regulations impliedly precludes direct review of other agency rules. Even where no special review provision exists, a plaintiff suffering *Abbott-Laboratories*-type injury can generally challenge a regulation outside the context of any specific application. See *NWF*, 497 U.S. at 891. The existence of special review provisions in other statutory contexts simply highlights the fact that, when Congress wishes to override the usual limitations on review of agency regulations qua regulations, it has a ready means of doing so.

[2] Respondents' reliance (Br. 14-15) on *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), is misplaced. In holding that the plaintiff's APA suit could go forward, the Court in *Bowen* concluded that litigation in the Claims Court would not provide an "adequate remedy" within the meaning of 5 U.S.C. 704 because the Claims Court's remedial authority would be limited to the provision of monetary compensation for *prior* violations of law, and would not extend to prospective equitable relief to prevent future harms. See *id.* at 904-905 & n.39. That analysis does not speak to the question whether, or under what circumstances, review

3. Respondents contend (Br. 21-22) that, if a plaintiff's stand-alone challenge to a regulation presents a "purely legal" question, the challenge is ripe for judicial review even if the plaintiff can identify no immediate hardship beyond the minimum needed to establish Article III standing. Respondents further argue (Br. 25) that their challenge to 36 C.F.R. 215.4(a) and 215.12(f) was "purely legal" and "did not depend on how the challenged regulation[s] w[ere] applied to any particular project." Those arguments lack merit.

a. The Court in *NWF* explained that a regulation may be reviewed in isolation from any specific application when a special review provision authorizes such a challenge, and when the regulation "as a practical matter requires the plaintiff to adjust his conduct immediately." 497 U.S. at 891. The Court did not suggest that a direct challenge presenting a "purely legal" question may go forward even in the absence of those circumstances. Similarly in *CSS*, the Court based its ripeness analysis solely on the absence of proof that any identified plaintiff had been affected by the challenged regulations in a sufficiently concrete way to satisfy the *Abbott Laboratories* standard. See 509 U.S. at 57-66.

In *NPHA*, the Court quoted the relevant discussion in *NWF* with approval, see 538 U.S. at 808; concluded that the plaintiff would not suffer significant hardship if judicial review were deferred to a concrete dispute, see *id.* at 808-812; and then went on to explain in a single paragraph that further factual development would assist the courts in assessing the challenged regulation's validity, see *id.* at 812. Read in the context of the opinion as a whole, that para-

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of a concrete application of a regulation will provide an "adequate remedy" for any legal defect in the rule.

graph is best understood as explaining that the relative unfitness of the disputed issues for immediate judicial review provided an *additional* basis for holding the suit unripe. The Court did not suggest that, if the contested issues *had* appeared more fit for judicial resolution apart from any specific application of the rule, the plaintiff's naked challenge to the rule would have been ripe despite the absence of significant hardship from deferring review.[3]

Ripeness doctrine is grounded largely on the premise that, other things being equal, judicial review is likely to rest on a "surer footing," *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967), if it focuses on a concrete application of a regulation. In many instances, the clarifying potential of a concrete factual setting cannot easily be assessed until lawyers and judges are deeply immersed in a case. For that reason, a court confronted with a challenge to a regulation independent of any agency action in which it has been applied often cannot reliably determine whether the court's understanding of the pertinent legal issues would be enhanced by observing a specific application. Cf. *Washington State Grange* v. *Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008) ("Facial challenges are disfavored for several reasons," including that "[c]laims of facial invalidity often rest on speculation.").

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[3] In other decisions of this Court cited by respondents in which challenges to regulations were allowed to go forward, the regulation inflicted hardship akin to that in *Abbott Laboratories* by exposing the plaintiff to criminal or civil enforcement or posing an immediate threat to its existing business or contractual arrangements, see Resp. Br. 23 (citing *United States* v. *Storer Broad. Co.*, 351 U.S. 192 (1956); *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956); *Columbia Broad. Sys., Inc.* v. *United States*, 316 U.S. 407 (1992)), or relegated it to a nonjudicial forum in asserted violation of Article III of the Constitution, see Resp. Br. 20 (citing *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985)).

Congress may conclude that, for a particular class of regulations, the interest in expeditious resolution of potential challenges outweighs the systemic advantages of a rule requiring as-applied review. And a direct challenge, independent of a concrete application, may go forward if denying review would subject the plaintiff to *Abbott-Laboratories*-type harm. When those circumstances are absent, however, a court should not entertain an abstract challenge based simply on its ad hoc assessment—which will rest of necessity on speculation as to what a *hypothetical* concrete setting *might* reveal—that the disputed issues are "fit" for immediate review.

b. In any event, respondents are wrong in contending that their challenge to 36 C.F.R. 215.4(a) and 215.12(f) presents "purely legal" questions (Br. 25) concerning the regulations' purported facial "inconsistency with the plain language of [their] authorizing legislation" (Br. 10). The relevant provision of the Forest Service Decisionmaking and Appeals Reform Act (ARA), Pub. L. No. 102-381, Tit. III, 106 Stat. 1419 (1992) (16 U.S.C. 1612 note), requires the Forest Service to establish notice, comment, and administrative-appeal processes for "projects and activities implementing land and resource management plans." ARA § 322(a), 106 Stat. 1419. The district court recognized, however, and respondents agree, that the ARA "permits exclusion of environmentally insignificant projects from the appeals process." Pet. App. 51a; see Resp. Br. 27.

Thus, although respondents' facial challenge to 36 C.F.R. 215.4(a) and 215.12(f) logically depends on the proposition that the Forest Service lacks any authority to exempt particular activities from ARA Section 322, respondents in fact do not contend that *all* Forest Service projects are subject to the ARA procedures. Rather, respondents challenge the standard used by the agency to assess the

environmental significance of particular activities—*i.e.*, whether preparation of an environmental assessment (EA) or environmental impact statement (EIS) is required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq*. Contrary to respondents' contention (Br. 27-28), judicial review of that standard would be assisted by examination of the rules' application to particular activities found by the Forest Service to be environmentally insignificant. And, again contrary to respondents' contention (Br. 27), the ARA's reference to "projects and activities implementing land and resource management plans" provides no clear line of demarcation between activities that are and are not environmentally significant for the ARA's purposes. Given the imprecision of the statutory text, the Forest Service necessarily exercised its expert judgment in balancing the ARA's goal of public participation against the interest in avoiding undue delays and administrative burdens with respect to minor projects. Whatever the merits of respondents' attack on the manner in which the agency struck that balance, their challenge is not a "purely legal" one.

For similar reasons, respondents are also wrong in arguing (Br. 27) that, if 36 C.F.R. 215.4(a) and 215.12(f) are invalid in some of their applications, they are invalid *in toto*. Even assuming, *arguendo*, that timber sales like the Burnt Ridge Project (the only site-specific action that was ever before the district court in this case) are too environmentally significant to be exempted from the ARA's procedural requirements, it would not follow that the same is true of the other categories of Forest Service projects (see J.A. 79-80) that were encompassed by the court's injunction. Respondents contend (Br. 27-28 & n.4) that, even if the Forest Service might have promulgated a *different* regulation exempting some of those projects from the ARA's procedural

requirements, Sections 215.4(a) and 215.12(f) are facially invalid because they incorporate an incorrect standard for assessing environmental significance. The challenged regulations, however, refer to projects and activities that have been excluded from EIS and EA requirements "pursuant to [Forest Service Handbook] 1909.15, Chapter 30, section 31." 36 C.F.R. 215.4(a), 215.12(f). See United States Forest Service, *Amend. No. 1909.15-2007-1, Environmental Policy and Procedures Handbook* (*Handbook*) (approved Feb. 9, 2007) <http://www.fs.fed.us/im/directives/fsh/1909.15/1909.15_30.doc>. Rather than incorporating that *Handbook* provision by reference, the agency might have reproduced the *Handbook*'s list of categorically excluded activities as discrete subsections in the text of Sections 215.4(a) and 215.12(f) themselves. There then would have been no basis for treating the perceived invalidity of one regulatory subsection as a ground for striking down the regulations in their entirety. Facial invalidation is no more appropriate simply because the agency achieved the same substantive result through more economical drafting.

4. Respondents suggest (Br. 28, 35-36) that the impact of 36 C.F.R. 215.4(a) and 215.12(f) on the ability of respondents and their members to comment on and administratively appeal Forest Service projects is itself sufficient hardship to satisfy the *Abbott Laboratories* standard. That is incorrect. Standing alone, the loss of such procedural opportunities does not even constitute Article III injury in fact, let alone *Abbott-Laboratories*-type harm. See Gov't Br. 30-32. Rather, respondents will suffer judicially cognizable injury only if, and to the extent that, the agency actually carries out a project that diminishes their members'

enjoyment of a specific affected tract in a National Forest.[4] Even assuming that the application of 36 C.F.R. 215.4(a) and 215.12(f) to some projects might violate the ARA, a court challenge to the relevant site-specific activity provides an adequate mechanism for protecting respondents' members from tangible harm. See Gov't Br. 31.[5] Respon-

[4] Indeed, curiously, although respondents suggest that the diminution of their opportunities to participate in Forest Service procedures is by itself the sort of immediate harm that renders their facial challenge to 36 C.F.R. 215.4(a) and 215.12(f) ripe for judicial review, they expressly (and correctly) disavow the contention that the unavailability of those procedures, standing alone, constitutes Article III injury in fact. Compare Resp. Br. 28, 35-36, with *id.* at 46.

[5] Respondents contend (Br. 32 n.7) that some (unspecified) projects involving off-highway vehicle (OHV) use may go forward without prior notice to the public, thus making it more difficult to bring as-applied challenges to particular site-specific activities. In November 2005, after the district court ruled in this case, the Forest Service issued travel management regulations that require each National Forest to develop a transportation management plan (TMP) designating the roads, trails, and areas under Forest Service jurisdiction that are open to motor vehicle use, as well as the classes of vehicles that may be used at various locations and at various times of the year. See 70 Fed. Reg. 68,264; 36 C.F.R. 212.50(a), 212.51(a). Designations under those rules are developed pursuant to NEPA and include public notice and involvement. 36 C.F.R. 212.52(a). A proposal to construct or upgrade an OHV trail could be made as part of a TMP, in which case the public would be given notice and an opportunity to comment pursuant to 36 C.F.R. 212.52. Even when site-specific proposals to construct or modify OHV trails are made apart from a TMP, the Forest Service will often provide notice of such projects in schedules of proposed actions or through the scoping process (see Gov't Br. 22-24). With regard to OHV-related special events, issues concerning recurring events could be raised in the designation process. Other OHV-related special events would require a special use permit, 36 C.F.R. 251.50(a) and (c)(1), 251.51, subject to scoping, which sometimes would include public notice.

It is possible that some minor activities involving OHV use could go forward without any prior notice to the public. But respondents have

dents' situation is therefore very different from that of the plaintiffs in *Abbott Laboratories*, which could have pursued an as-applied challenge only by *violating* the regulations and subjecting themselves to a government enforcement action, and to potential "serious criminal and civil penalties" if the as-applied challenge was ultimately unsuccessful. 387 U.S. at 153.

5. Respondents are wrong in suggesting (Br. 36) that the government's approach to ripeness improperly "give[s] regulated industries preferential rights to challenge agency actions as compared to other citizens." As respondents concede (Br. 37), a regulated entity is generally foreclosed from pursuing a facial challenge to agency regulations unless deferring judicial review would subject the plaintiff to *Abbott-Laboratories*-type injury. See *Toilet Goods Ass'n*, 387 U.S. at 165 (where non-compliance with an agency regulation would result in only a minor sanction, which could then be challenged in court, "[s]uch review will provide an adequate forum for testing the regulation in a concrete situation"). Conversely, if a Forest Service regulation declared a particular site within a National Forest to be open for specified classes of ground-disturbing conduct, without the need for further agency decisions approving particular site-specific activities, a plaintiff whose enjoyment of that site would be impaired by the authorized conduct would have a

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not specifically identified any such projects, nor have they given any reason to believe that 36 C.F.R. 215.4(a) and 215.12(f) would be invalid as applied to such activities. Such projects, moreover, are quite dissimilar to the Burnt Ridge Project—the site-specific activity that, in the court of appeals' view, rendered Sections 215.4(a) and 215.12(f) ripe for judicial review. The potential application of Sections 215.4(a) and 215.12(f) to unspecified minor OHV activities therefore provides no basis for adjudicating respondents' facial challenge to the regulations, let alone for holding the rules to be facially invalid.

ripe claim. Cf. *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 738-739 (1998). It may be that under the framework established by this Court's decisions, persons whose own primary conduct is the subject of an agency regulation will *more frequently* be able to pursue a facial challenge than will persons on whom the effects of a rule are less direct. But there is nothing anomalous or improper about that result, which simply reflects the greater likelihood that persons whose own primary conduct is regulated will suffer immediate hardship from promulgation of a rule. Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (explaining that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish") (internal quotation marks omitted).

B. Respondents Have Failed To Establish Standing

1. As our opening brief explains (at 28), the first declaration of Ara Marderosian (J.A. 15-23) established a likelihood that Marderosian would be injured by the Burnt Ridge Project. Respondents contend (Br. 41-42) that the first declaration of Jim Bensman (Pet. App. 68a-77a) established a similar likelihood of injury from other projects subject to 36 C.F.R. 215.4(a) and 215.12(f), even after the Burnt Ridge Project had been withdrawn. The crucial difference between the two declarations, however, is that Marderosian identified a *specific* timber sale (J.A. 17), averred that he had frequently visited the site of the project in the past and intended to do so in the future (*ibid.*), and explained in detail how the project would impair his enjoyment of the area (J.A. 19-20). Bensman's declaration, by contrast, failed to identify *any* specific project to which Sections 215.4(a) and 215.12(f) had been applied that, if consummated, would cause him injury. See Gov't Br. 29-30.

2. For essentially the same reason, respondents are also wrong in arguing that they have standing because "[p]rocedural rights like those at issue here are 'special.'" Resp. Br. 39; see *id.* at 39-40. To be sure, if the Burnt Ridge Project had not been withdrawn—thereby mooting the only challenge properly before the court to begin with (see Gov't Br. 34-40)—respondents Sequoia ForestKeeper and Sierra Club would have had standing (based on the first Marderosian declaration, see J.A. 16-17) to challenge that Project, and to argue that the Project could not lawfully go forward because the ARA's procedural requirements had been violated. Respondents' standing to pursue such a challenge would not have been negated by their inability to prove that the use of notice, comment, and administrative-appeal procedures would have ultimately changed the Forest Service's decision on the Project. See Gov't Br. 30-32. But that is because Marderosian's declaration established that the on-the-ground activities entailed by the Burnt Ridge Project, if carried out, would have injured him. While the alleged procedural defect would have been a legal basis for challenging that project on the merits, it was not an independent basis for standing.

The defect in the Bensman declaration was not that it failed to eliminate uncertainty as to the effect that the use of ARA procedures might have had on a similar specifically identified Forest Service decision. Rather, that declaration was insufficient to establish standing because it did not identify *any* site-specific agency action that could be expected to impair Bensman's enjoyment of the affected site in a National Forest.[6]

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[6] When a plaintiff establishes a likelihood of injury from an identified site-specific governmental action, and argues that the action was unlawful because the government failed to comply with applicable procedural requirements, uncertainty as to whether use of the relevant procedures

3. Relying on *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000), respondents contend (Br. 38, 43-44) that, because the Marderosian declaration established their standing as an initial matter, they bear a reduced burden of showing that their injury is likely to recur. Respondents' reliance on *Laidlaw* is misplaced. The Court in *Laidlaw* recognized that the defendant's unilateral cessation of the conduct at issue in a citizen suit would not render the case moot unless the defendant could demonstrate, to a high degree of certainty, that the challenged conduct would not recur. See *ibid.*; see also *id.* at 214 (Scalia, J., dissenting). In this case, however, cessation of the challenged conduct was not through unilateral action by the Forest Service. After the agency withdrew the Burnt Ridge Project, the parties entered into a negotiated settlement, under which respondents agreed to dismissal with prejudice of their challenges to that timber sale, and that embodied the Forest Service's binding commitment to prepare an EIS or EA before implementing the Burnt Ridge Project in the future. See J.A. 74; Gov't Br. 34-36. That binding commitment eliminated any danger that the Project will ever go forward without the notice, comment, and administrative-appeal procedures that respondents contend are required by the ARA. See Gov't Br. 35-36.

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would change the outcome goes to the *redressability* of the plaintiff's harm, not to the existence of injury in fact. This Court has recognized that a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 572 n.7; see Gov't Br. 30-31. But the fact that ARA Section 322 establishes procedural rather than substantive requirements does not lessen respondents' burden to show *injury in fact* with the requisite degree of specificity—*i.e.*, by identifying *particular* site-specific actions that subject respondents' members to actual or threatened harm.

4. Respondents' reliance (Br. 42-43) on their post-judgment declarations is also misplaced. As this Court recently reaffirmed, "[w]hile the proof required to establish standing increases as the suit proceeds, * * * the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis* v. *FEC*, No. 07-320 (June 26, 2008), slip op. 7-8. If (as our opening brief explains, see Gov't Br. 29) respondents' suit was subject to dismissal for lack of standing at the time the district court entered judgment, the suit could not be revived by respondents' later evidentiary submissions. See Gov't Br. 33. And, in any event, those declarations fail to identify any cognizable actual or imminent injury with the necessary specificity.[7]

C. The District Court's Award Of Nationwide Relief Was Improper

The court of appeals held that the nationwide injunction ordered by the district court was "compelled by the text of the [APA]," and specifically by 5 U.S.C. 706, which directs the reviewing court to "set aside" agency action that is found to be unlawful. See Pet. App. 21a. Respondents do not defend the court of appeals' holding that 5 U.S.C. 706 *required* the district court to award nationwide relief. They argue instead (*e.g.*, Br. 48) that the district court's issuance of a nationwide injunction was a permissible exercise of remedial discretion. That argument lacks merit.

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[7] To the extent respondents rely on the projects identified in those declarations to establish ripeness (see Resp. Br. 29-30), the declarations make clear that respondents had ample notice and opportunity to bring site-specific challenges to particular timber projects, in which respondents could have contended that the projects should not go forward because they were adopted without compliance with the ARA. See J.A. 85, 86, 87, 90, 94, 98, 99; see also Gov't Br. 23.

1. As our opening brief explains (at 43-44), this Court has held that nonmutual collateral estoppel should not apply against the United States because such a rule "would substantially thwart the development of important questions of law" and "would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984). The Court in *Mendoza* further explained that such a rule would impose unjustified burdens on the Executive Branch's conduct of government litigation. See *id.* at 160-162. In this case, by contrast, the district court endorsed the view, expressed in a pre-*Mendoza* court of appeals decision, that an administrative agency ordinarily should "accept the first ruling of a court of appeals on a particular point or else seek reversal in the Supreme Court or a statutory change by Congress." Pet. App. 32a (quoting *Hi-Craft Clothing Co.* v. *NLRB*, 660 F.2d 910, 912 n.1 (3d Cir. 1981)).

Respondents correctly observe (Br. 52) that, because this case presents no question concerning the preclusive effect of a prior judgment, it is not squarely governed by the collateral-estoppel rule announced in *Mendoza*. The *Mendoza* Court's *reasoning*, however, is directly apposite here. In tailoring "the judicially developed doctrine of collateral estoppel," *Mendoza*, 464 U.S. at 158, to suits involving the United States, the Court in *Mendoza* relied heavily on its determination that precluding relitigation of legal issues decided against the government would disserve the institutional interests both of this Court and of the Executive Branch. To the extent that the scope of equitable relief in this case was confided to the discretion of the district court, the court abused that discretion by relying on a view of sound judicial administration directly contrary to the conclusions stated by this Court in *Mendoza*.

Although respondents do not endorse the court of appeals' holding that the district court was *required* to order nationwide relief, they suggest that vacatur of 36 C.F.R. 215.4(a) and 215.12(f) was the *presumptively* correct remedy because "[t]he APA's 'shall . . . set aside' language indicates that the government must provide a substantial reason to avoid having unlawful action set aside." Resp. Br. 49. That is incorrect. In authorizing review of agency action in a suit for declaratory or injunctive relief, see 5 U.S.C. 703, the APA suggests no departure from the well established rule that the party seeking an injunction bears the burden of establishing that such relief is necessary. See, *e.g.*, *eBay, Inc.* v. *MercExch., L.L.C.*, 547 U.S. 388, 391 (2006). Thus, under the APA, a party challenging agency action must demonstrate that a declaratory judgment would be inadequate and that the further relief of an injunction addressed even to the particular site-specific action before the court is necessary. A fortiori, such a party must make a compelling showing to justify the extraordinary remedy of a nationwide injunction affecting site-specific projects and persons not before the court. Moreover, if an injunction against the challenged "agency action" *were* the presumptive remedy in an APA suit, that fact would simply reinforce the conclusion that the site-specific application of an agency regulation (here, the Burnt Ridge Project) is ordinarily the "action" subject to APA review. Treatment of the site-specific action in which a regulation was applied as the reviewable "action" protects the agency's ability to relitigate legal issues concerning the validity of its regulations, thus serving the institutional interests identified in *Mendoza*, without creating even an arguable conflict with the text of Section 706.

2. Respondents contend (Br. 54) that the district court's entry of a nationwide injunction was appropriate

because this is "a case involving multiple plaintiffs facing injury across the country." The district court's analysis of respondents' standing, however, relied exclusively on the first declaration of Jim Bensman. Pet. App. 42a-44a; see *id.* at 68a-77a (Bensman declaration). Bensman identified himself as a member of respondent Heartwood, see *id.* at 68a, and the district court concluded that "[Bensman] and Heartwood have suffered actual injury due to the Forest Service's regulations implementing the ARA," *id.* at 43a. At the time the district court clarified that its injunction was to have nationwide effect, see *id.* at 31a-33a, no other plaintiff organization had offered evidentiary support for the allegation that its members would be harmed by the Forest Service's continued implementation of 36 C.F.R. 215.4(a) and 215.12(f).[8] Particularly under those circumstances, the mere presence on the complaint of multiple, geographically diverse plaintiffs provided no basis for the entry of nationwide relief.

3. When a regulated party suffers *Abbott-Laboratories*-type injury from the promulgation of an agency rule, and is allowed on that basis to obtain judicial review of the regulation apart from any concrete application thereof, the appropriate relief if the suit is successful ordinarily is to bar the

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[8] Although the first Marderosian declaration (J.A. 15-23) described the harms that Marderosian would suffer if the Burnt Ridge Project went forward, it did not identify any other site-specific activity that would cause Marderosian injury, and the parties' dispute over the Burnt Ridge Project was settled well before the district court entered judgment in this case. Respondents' post-judgment declarations, some of which were executed by other persons who were members of organizations other than Heartwood, were submitted after the district court had ruled on the merits and had ordered nationwide relief. They identified projects that could have been the subject of site-specific challenges like the challenge to the Burnt Ridge Project here, for which venue often would have lain in other judicial districts.

agency from applying the rule to the plaintiff. See Gov't Br. 43 n.15. Respondents correctly observe (Br. 58) that, given the nature of the regulations at issue here, the relief in this case "could not practicably have been limited to the parties before the court."[9] It does not follow, however, that no appropriate means of limiting the relief awarded was available to the courts below, even if relief could appropriately have extended beyond a particular site-specific action properly before the court.

The government argued in the district court that, even accepting the court's prior holding that respondents' naked facial challenge to 36 C.F.R. 215.4(a) and 215.12(f) was justiciable, any injunctive relief should be limited to Forest Service projects in the Eastern District of California, the district where the suit was brought. See Pet. App. 31a. If the injunction had been limited in that manner, the precedential effect of the court of appeals' affirmance of the district court's merits ruling regarding Sections 215.4(a)

[9] Where it applies, the ARA requires that notice of proposed actions be published either in the Federal Register or in a newspaper of general circulation. See ARA § 322(b)(1)(B)(i) and (ii), 106 Stat. 1419. By their nature, those forms of notice cannot be provided to respondents and their members without being provided to the general public. After the requisite notice is published, the Forest Service must allow 30 days for public comment, see ARA § 322(b)(2), 106 Stat. 1419, and (unless the agency determines that an emergency situation exists) it must stay its decision for 45 days even if no administrative appeal is filed, see ARA § 322(e)(1), 106 Stat. 1420. With respect to any site-specific Forest Service action, there is no coherent way of applying the comment-period and stay requirements to respondents and their members alone. The infeasibility of plaintiff-specific relief under this regime, however, simply reflects the fact that neither ARA Section 322 nor 36 C.F.R. 215.4(a) and 215.12(f) apply "to" any private party in the sense of governing the primary conduct of persons outside the agency. Those statutory and regulatory provisions instead govern the Forest Service's own decision-making process.

and 215.12(f) would have effectively precluded the Forest Service from applying those regulations to projects within the Ninth Circuit. See Gov't Br. 17-18 n.5. A remedy limited to the geographic jurisdiction of the reviewing courts would have afforded respondents meaningful relief while vindicating the institutional interests discussed in *Mendoza*.

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For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded with instructions to dismiss the complaint.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General

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